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IN THE
Supreme Court of the United States

October Term, 1998

STATE OF VERMONT AGENCY OF
NATURAL RESOURCES,

Petitioner,

v.

UNITED STATES OF AMERICAN *EX REL.*
JONATHAN STEVENS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* STATES OF NEW YORK, ALABAMA, ALASKA,
ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT,
DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA,
IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MISSOURI,
MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA,
NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH
DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON, WEST VIRGINIA
and WYOMING IN SUPPORT OF PETITIONER

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No. 98-1828

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OCTOBER TERM, 1998

STATE OF VERMONT AGENCY OF
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Petitioner,

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UNITED STATES OF AMERICA EX REL.
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SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, WASHINGTON,
WEST VIRGINIA and WYOMING IN SUPPORT OF PETITIONER

STATEMENT OF AMICI INTEREST

The States of New York, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia and Wyoming urge this Court to grant certiorari in this case involving two important questions affecting the liability of States under the federal False Claims Act ("FCA"). At issue in this case is, first, whether a State is a "person" who may be sued by private citizens or by the United States under the FCA and, second, whether a private person may sue a State under the FCA in order to reap a financial reward for himself and to recover money for the United States despite the bar of the Eleventh Amendment to the U.S. Constitution.

Both issues have been the subject of recent conflicting determinations by the United States Courts of Appeals. Compare *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 1999 WL 178713 (D.C. Cir. April 2, 1999), *opn. supplemented*, 1999 WL 252644 (D.C. Cir. April 30, 1999) (State is not a "person" under the FCA); *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (5th Cir. 1999) (Eleventh Amendment bars suits by private citizens against States), with *United States ex rel. Stevens v. State of Vermont Agency of Natural Resources*, 162 F.3d 195, 203 (2d Cir. 1998), *pet. for cert. pend'g*, No. 98-1828 (May 11, 1999) (State is a "person" under the FCA and Eleventh Amendment is not a bar); *U.S. ex rel. Zissler v. Regents of the University of Minnesota*, 154 F.3d 865, 874 (8th Cir. 1998) (State is a "person" under the FCA); *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865 (8th Cir. 1998) (Eleventh Amendment

is not a bar to FCA lawsuit), *pet. for cert. pend'g*, No. 98-1664 (April 14, 1999).

This case affords the Court the opportunity to review both issues. *Amici* States accordingly urge this Court to grant Vermont's petition and thereby to resolve both matters affecting the States' liability under the FCA.

The decision below undermines the *amici* States' interests and upsets the federalist balance in two important ways. First, its holding that States are "persons" subject to suit under the FCA exposes the States to very significant financial liability. States receive substantial federal dollars under a vast array of federal social welfare, education, environmental, transportation and other programs where they perform regulatory and police power functions. Federal grants to State and local governments doubled from \$115 billion in 1988 to \$230 billion in 1997. See Bureau of the Census, U.S. Department of Commerce, Publication FES/97, Federal Expenditures by State for Fiscal Year 1997 at 46, Table 11 (April 1998). Under these federal grant programs, States agree to comply with certain federal requirements, including the responsibility to repay federal dollars that are overpaid to the State in error.

The FCA exposes States to penalties that can amount to hundreds of millions of dollars. Pursuant to most federal aid programs, States file thousands of claims and numerous reports each year with federal agencies. Because a single policy or reporting practice that is found to be wrongful could taint each and every claim filed, and because there is a six-year statute of limitations under the FCA, there is a potential for enormous damages in FCA lawsuits against States. For example, in *Foulds*, the plaintiff alleged that staff physicians at Texas Tech Health Sciences Center routinely signed patient charts and Medicare/Medicaid billing forms certifying that they personally performed or supervised the performance of treatment for

patients when in fact the patients were allegedly seen only by residents. The *qui tam* relator alleged that based upon this wrongful practice, the State defendant submitted over 400,000 false claims and received over \$20 million in overpayments. 171 F.3d at 282 & n. 2. Because each false claim could result in a penalty of up to \$10,000, the State's liability in that case could amount to hundreds of millions, or even billions, of dollars. These potentially large financial judgments against States could have disastrous effects on a State's treasury.¹

Second, the opinion below would allow private citizens to sue States on their own behalf and on behalf of the United States. In the vast majority of cases, the United States remains on the sidelines and allows the *qui tam* relator to commence and prosecute the FCA lawsuit on his or her own. Because the private party is seeking only to reap a financial reward, the *qui tam* relator is usually prepared to pursue the litigation to final judgment or settlement without any concern for the disruption that burdensome discovery and a trial will have on the States' administration of these complex federal programs. More importantly, because the relator's only interest is financial, States lose a meaningful opportunity to resolve the underlying lawsuit through negotiation or through the political process, even if such a resolution would be in the public interest.

As this Court recognized in *Hughes Aircraft Company v. United States ex rel. Schumer*, 520 U.S. 939, 949 (1997), "[a]s

¹ A finding that the FCA cannot be applied to the States does not leave the United States without viable remedies. Most federal programs contain provisions requiring States to repay monies improperly received. See, e.g., 7 U.S.C. § 2020(g)(Food Stamps); 42 U.S.C. § 604 (Aid to Families With Dependent Children); § 1396(c)(Medicaid). If existing administrative remedies are inadequate to ensure the recovery of money erroneously or wrongfully obtained by the States, those mechanisms should be improved. The States should not be subjected to the punitive sanctions of the FCA through a rewriting of that statute.

a class of plaintiffs, *qui tam* relators are different in kind than the Government. They are motivated primarily by prospects of monetary reward rather than the public good." Because relators sue only for their own pecuniary gain, they do not share the federal government's broader interest in the public welfare. Consequently, FCA *qui tam* litigation causes State officials to devote time and resources to defending their actions in discovery and at trial. Even if it would be appropriate to attempt to resolve the dispute through negotiation or the political processes, States are impeded in their ability to do so where the lawsuit is being prosecuted by a private citizen with his own personal financial interest at stake.

In his dissenting opinion in the Second Circuit, Judge Weinstein eloquently expressed the enormous burden that a suit by a *qui tam* relator places on the States' ability to implement these major federal programs in partnership with the United States. He explained that "[a]pplication of the FCA's *qui tam* provisions to the States interferes with the political process in ways which seriously undermine the position of the States vis-a-vis the federal government." *Stevens*, 162 F.3d at 219 (Weinstein, J. dissenting).

Counsel for the relator in *Long*, for example, sought and obtained the production of voluminous documents, including documents that pertain to the internal decisionmaking processes of the New York State Education Department. He also noticed numerous depositions of current or former State employees in his ongoing effort to probe the internal processes of State government. Because FCA litigation is very disruptive, and a resolution through negotiation becomes extremely difficult given the relator's narrow focus, FCA *qui tam* lawsuits interfere with the efficient administration of important state administered regulatory programs.

SUMMARY OF ARGUMENT

The Courts of Appeals are squarely divided over the two issues raised in Vermont's petition. A resolution of the "person" issue will resolve the express and deep-seated conflict between the Second Circuit's decision below (which is in accord with the Eighth Circuit's decision in *Rodgers*) and the recent decision by the District of Columbia Circuit in *Long*. A determination of the Eleventh Amendment issue will resolve the express conflict between the Second Circuit's decision (which is in accord with the Eighth Circuit's decision in *Zissler* as well as earlier decisions by the Fourth and Ninth Circuits) and the recent decision by the Fifth Circuit in *Foulds*.

The conflicts among the Courts of Appeals reflect a basic disagreement over fundamental principles that underlie federalism. The core principles at issue on the "person" question involve the "ordinary rule of statutory construction" that a State is not usually considered a "person" where liability is imposed, and the "plain statement" rule which requires a clear statement of State inclusion whenever Congress enacts legislation that could alter the federal balance of power. A central principle at issue on the Eleventh Amendment question is that States have an Eleventh Amendment immunity to suit from private citizens, even when the private party is designated to sue on behalf of the United States as well as on his or her own behalf.

The *amici* States note that the United States acquiesces in grant of this petition. Because this case presents for review both related FCA issues upon which the Courts of Appeals are divided, it is an appropriate vehicle by which this Court may resolve the underlying issues involving important matters of federalism that affect the States' relations with the federal government. A resolution by this Court is essential.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW OF VERMONT'S PETITION IN ORDER TO RESOLVE THE CONFLICT IN THE CIRCUITS AND DECIDE THE IMPORTANT ISSUES OF FEDERALISM PRESENTED BY THE PETITION.

The conflicts among the Courts of Appeals with respect to the application of the FCA to the States reveal two dramatically competing views of the FCA. In the States' view, the decision of the Second Circuit majority, which essentially adopted the position of the United States and the relator, undermines federalism and seriously distorts this Court's rulings. If left undisturbed, the Second Circuit's decision would expose States to FCA liability that was never envisioned by the Congress that enacted the FCA in 1863.

A. The Person Issue

Under this Court's precedents, two principles that underlie federalism must be used in determining that States are not "persons" under the FCA: the "ordinary rule of statutory construction" that the word "person" in a statute does not include "State," and the "plain statement" rule.

1. The "Ordinary Rule of Statutory Construction"

First, this Court has held that, under the "ordinary rule of statutory construction," where "person" is included in a statute that imposes a new liability, that word does not include State. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1978). This rule of statutory construction should apply to the FCA which covers the conduct of "any person" and provides

liability for treble damages and penalties to which the States had previously not been subjected.

The United States and the relator contend that this rule of statutory construction does not apply where the statute is for the benefit of the United States and where its purpose, prevention of fraud, is clear. That argument finds no support in case law.

They further contend that because the statute also uses the word "person" to define the relator in 31 U.S.C. § 3730(b), and because some States have been *qui tam* relators, the applicable principle of statutory construction is that the same word used in different sections of the same statute should have the same meaning. As the D.C. Circuit explained in *Long*, this principle does not apply to the FCA because, inter alia, "[i]mposing liability is quite different from conferring a right to sue," and the canon has an important exception where the subject matter to which the word refers is not the same. *Long*, 1999 WL 178713 at * 17, n. 15.

2. The "Plain Statement" Rule

Second, this Court has held that the "plain statement" rule requires Congress to provide a "clear" or "plain" statement whenever it enacts a law that: (a) alters the federal balance of power; (b) preempts the historic powers of the States; (c) abrogates the States' sovereign immunity; or (d) imposes a new condition upon the receipt of federal funding. See, *Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 196, 206 (1991); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *Will*, 491 U.S. at 64; *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989); *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981); *United States v. Bass*, 404 U.S. 336 (1971). This rule squarely applies to the FCA.

In *Bass*, Justice Marshall explained:

[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.

404 U.S. at 349.

There is no dispute that the FCA does not contain a "plain statement" that States are included within the scope of the liability provision. The respondents argue that the "plain statement" rule has no application to the FCA because the States have no sovereign immunity with respect to the federal government. They further contend that States have no historic right to defraud the United States and, therefore, the United States is not imposing a financial burden on the States when it obtains additional monetary penalties under this statute. These arguments have been successful not only in the Second Circuit but also in the Eighth Circuit's decision in *Zissler*.

This analysis of the effect of the FCA on States misconstrues the function of the "plain statement" rule, which is to protect the States' position in our federalist scheme against unconsidered federal encroachment that usurps the States' authority, and mistakes the intrusiveness of FCA *qui tam* lawsuits on the States' performance of essential functions. Judge Silberman, the author of the *Long* opinion, properly noted that "the Act's imposition of liability necessarily interferes with a State's sovereign performance of a range of indisputably essential functions, such as the administration of a State education department involved in the present case. . . . That the federal government funds in part that function does not destroy its essentiality to the State." *Long*, 1999 WL 178713 at * 15 (fn. omitted).

3. The Legislative History of the False Claims Act

The legislative history of the FCA demonstrates that the Act was never meant to apply to the States either when it was originally enacted in 1863 or when it was later amended.

The FCA was enacted in 1863 to combat rampant fraud by large private war material contractors in Civil War defense contracts. *See United States v. Bornstein*, 423 U.S. 303, 309 (1976); *United States v. Hess*, 317 U.S. 537, 547 & n. 12 (1943). Because the Union of States had been billed for nonexistent or worthless military goods, Congress sought to stop this plundering of the Union's treasury. *See, e.g.*, 62 Cong. Globe, 952-958, 37th Cong., 3d Sess. (1863).

As originally enacted in 1863, the FCA prohibited "any person not in the military" from submitting a false claim or a false record in order to have a claim paid to the United States, or causing such claim or record to be presented and paid. Where liability was found, the statute provided for both civil penalties (double damages plus a fine of two thousand dollars and costs) and criminal penalties (possible imprisonment). *See* Act of March 2, 1863, §§ 1, 3, 37th Cong. Chap. 67, 12 Stat. 696, 698.

There was no mention of States in the original legislative history. The legislative debates from the 1863 law discussed individual private war contractors who had defrauded the Union, not States. *See, e.g.*, 62 Cong. Globe 955 (1863) ("The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such. . . .") (remarks of Sen. Howard); *id.* at 958 ("if a man swindles the government in times like this there ought never to be any limitation. . . .") (remarks of Sen. Grimes).

The only reference to State officials (but not States themselves) is contained in a report by a House investigating committee

from 1862 which, in the course of reporting on the grossest frauds upon the government in the provision of war contracts, made reference to fraud by a quartermaster in Indiana. *See* H.R. Rep. No. 2, 37th Cong., 2d Sess. xxxviii-xxxix (1862). When the FCA was debated in Congress the following year, the sole reference to the 1862 report was made by Senator Wilson of Massachusetts in the context of arguing in favor of language of the bill that would make war contractors liable as if they were "in the military or naval forces of the United States." 62 Cong. Globe at 956. Senator Wilson did not discuss the portion of the 1862 report referring to State officials.

For 123 years, from 1863 until 1986, the statute was "largely unchanged." H.R. Rep. No. 99-660, 99th Cong. 2d Sess. (1986) at 17. *See also* Act of Sept. 13, 1982, Pub. L. 97-258, 96 Stat. 877 (reorganizing the statute without making any substantive changes -- the language of the liability provision was rewritten to apply to "[a] person not a member of an armed force of the United States").

In 1986, the statute was substantially amended. The amendments defined knowledge of a false claim to include reckless conduct and deliberate ignorance of the circumstances. The amendments also increased the punitive nature of the statute by providing for treble damages and a civil penalty of between \$5,000 and \$10,000 that could be imposed for each false claim or false report filed. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 § 2 (1986), amending 31 U.S.C. § 3729 (the liability section of the Act).

However, Congress in 1986 made no substantive change to the scope of section 3729, which defined the group subject to the liability provisions of the Act. In fact, the provision returned to its (pre-1982) format of applying to "[a]ny person" although the exception for members of the armed forces was revised and moved to a new section, 31 U.S.C. § 3730(e)(1).

The legislative history of the 1986 amendments shows that Congress wanted to provide stronger measures to combat fraud by private enterprise against the United States. There is no evidence in the legislative history that fraud committed by States was under consideration or that Congress discussed and debated the financial impact upon States of increasing the Act's penalties and providing for treble damages. In fact, the Congressional Budget Office advised that the 1986 amendments were "expected to involve no significant costs to the federal government or to State or local governments." S. Rep. No. 99-345, 99th Cong. 2d Sess. (1986) at 37, *reprinted in* 1986 U.S. Code Cong. & Adm. News ("U.S.C.C.A.N.") 5266, 5302.²

B. The Eleventh Amendment Issue

This Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996), stands for the proposition that the Eleventh Amendment prevents private parties from suing States in federal court under a statute, like the FCA, which was enacted in 1863 under Congress' Article I power. Because *qui tam* relators have a separate, legal interest in the FCA lawsuit, they are private persons suing States for money damages and their FCA suits against States are barred by the Eleventh Amendment.

The United States and the relator assert that the Eleventh Amendment does not apply to the FCA because the only "real party in interest" is the United States and the States have no

² The only reference to States as liable parties came in a discussion in the background and history section of the Act in the Senate Report, where the committee assumed that States were already covered by the statute. S. Rep. No. 99-345 at 8, *reprinted in* 1986 U.S.C.C.A.N. at 5273. The D.C. Circuit properly concluded in *Long* that this assumption of the Senate Report was wrong and "of no legal significance." *Long*, 1999 WL 178713 at * 6. *Accord United States ex rel. Graber v. City of New York*, 8 F.Supp.2d 343, 354-55 (S.D.N.Y. 1998), *overruled by Stevens*, 162 F.3d 195.

Eleventh Amendment immunity against the federal government. The Second Circuit's opinion, which supports respondents' position, also represents the view of a majority of the Circuits which have addressed the issue. *See Zissler*, 154 F.3d at 872 ("[T]he United States is the real party in interest because of its significant control over the course of the litigation and its dominant share of the proceeds thereof"); *see also United States ex rel. Berge v. Board of Trustees of the University of Alabama*, 104 F.3d 1453 (4th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 301 (1997); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992); *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715 (9th Cir. 1994).

However, these decisions ignore the fact that the relator has a separate, legal interest in the FCA lawsuit and is solely responsible for prosecuting the action where the United States does not intervene. The original statute authorized the "person" bringing the suit and "prosecuting it to final judgment" to recover one-half of the damages recovered. *See Act of March 2, 1863, supra*, § 6. The statute now provides that "[a] person may bring a civil action for a violation of section 3729 *for the person and for the United States Government.*" 31 U.S.C. § 3730(b)(emphasis added).

In the event the United States does not proceed with the lawsuit, which occurred in the instant action, the relator is the only party who prosecutes the action through final judgment. *See id.* § 3730(b)(1), (b)(4)(B), (c)(3). According to the FCA, in these circumstances the person bringing "the action *shall* have the *right* to conduct the action." *Id.* § 3730(b)(4)(B), 3730(c)(3)(emphasis added). Although the United States can seek to intervene at a later stage of the proceedings, the federal government must show "good cause" to do so. *Id.* § 3730(c)(3). In addition, intervention by the United States at a later stage of

the proceedings is "without limiting the status and rights of the person initiating the action." *Id.* § 3730(c)(3).

Where the relator prosecutes the action to a judgment or settlement, the relator's share of the damages and penalties "shall be not less than 25 percent and not more than 30 percent of the proceeds." *Id.* § 3730(d)(2). Where the United States proceeds with the action, the relator is still entitled to receive between 15 and 25 percent of the proceeds. *See id.* § 3730(d)(1). The relator is also entitled to receive attorney's fees, costs and expenses from the person found liable. *See id.* § 3730(d)(1), (2).

Thus, the interests of the relator and the United States are separate. *See Hughes Aircraft*, 520 U.S. at 949 n. 5 ("[A] relator's interests and the Government's do not necessarily coincide. Moreover, as the statute specifies, *qui tam* actions are brought both 'for the person and for the United States Government.' 31 U.S.C. § 3730(b)(1)." (emphasis in original)).

Even if the *qui tam* relator were acting entirely at the behest of the United States, the United States is not authorized to designate private citizens to sue States. Such a designation runs afoul of the "plan of the convention," under which States gave up their claim of sovereign immunity, but only to the federal government. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991) ("We doubt, to begin with, that that sovereign exemption *can* be delegated -- even if one limits the permissibility of delegation (as respondents propose) to persons on whose behalf the United States itself might sue. The consent, 'inherent in the convention,' to suit by the United States -- at the instances and under the control of responsible federal officers -- is not consent to suit by anyone whom the United States might select.") (emphasis in original)).

The Fifth Circuit's decision in *Foulds*, the Eleventh Amendment discussion by the D.C. Circuit in *Long*, and the dissenting

opinions by Judge Weinstein in the Second Circuit in *Stevens* and by Judge Panner in the Eighth Circuit in *Rodgers*, are directly supportive of the States' position that the *qui tam* relator's FCA lawsuit is barred by the Eleventh Amendment. Because of the importance of the Eleventh Amendment issue to the States, this Court should review that issue, resolve the conflict between the Circuits and eventually conclude that the Eleventh Amendment constitutes a bar to the *qui tam* relator's lawsuit.

C. The Issues Are Of Fundamental Importance To The States

Finally, the *amici* States submit that review of both issues presented in this petition is important because the matters which divide the parties and the Circuits are fundamental to state-federal relations. The *amici* States therefore urge this Court to review the decision below to resolve the tension that exists between the position of the federal government and the relator and the position of Vermont over whether the Act can be applied to States.

CONCLUSION

**For the Reasons Discussed Herein and in the Petition, The
State of Vermont's Petition for a Writ of Certiorari Should
Be Granted.**

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June 10, 1999

Respectfully submitted,

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